Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLE

No. 79-1820

In the Supreme Court of the United States

GEORGE H. BADGER, Petitioner,

vs.

UNITED STATES OF AMERICA, and BETTY M. MILDENHALL, Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GLENN C. HANNI
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111
(801) 532-7080

Counsel of Record for Petitioner

TABLE OF AUTHORITIES

Page

Cohen v. United States, 431 F. 2d 830 (2nd Cir. 1970) 3, 6

Lufty v. United States, 198 F. 2d 76 (9th Cir. 1952) 3

Marks v. United States, 260 F. 2d 377 (10th Cir. 1958) 4

Munroe V. United States, 424 F. 2d 243 (10th Cir. 1970) 1

Riley v. United States, 363 F. 2d 955 (2nd Cir. 1975) 3, 7

United States v. Gurule, 522 F. 2d 20 (10th Cir. 1975) 3, 6

United States v. Kabot, 295 F. 2d 848 (2nd Cir. 1961) 3

United States v. Timberlake, 559 F. 2d 1375 (5th Cir. 1977) 3, 5, 6

No. 79-1820

In the Supreme Court of the United States

GEORGE H. BADGER, Petitioner,

vs.

UNITED STATES OF AMERICA, and BETTY M. MILDENHALL, Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I.

By not addressing issues raised in Badger's Petition for Writ of Certiorari, the government apparently concedes: (1) there is a conflict in the Federal Circuit Courts regarding what elements of a crime, if any, a defendant must admit before being entitled to an entrapment defense; (2) *Munroe v. United States*, 424 F. 2d 243 (10th Cir. 1970), the sole predicate for the Tenth Circuit's decision in this case is bad law, and to require a defendant to admit all elements of a crime including criminal intent before he

is entitled to an entrapment instruction violates his constitutional rights and conflicts with applicable decisions of this Court; (3) this Court in an appropriate case should exercise its supervisory powers and abolish the Tenth Circuit rule.

The government does argue that Badger presented no evidence of entrapment at trial and therefore was not entitled to a jury instruction on entrapment. The record in this case establishes the government's position is without merit.

From April of 1976 until September of 1977, the Internal Revenue Service conducted an extensive tax investigation into Badger's affairs. IRS Special Agent Thomas Harkness was assigned to this investigation and spent most of his time working on it. During this period, Badger at no time ever sought to meet or speak privately with Harkness regarding the possible outcome of the investigation. On the contrary he cooperated with the investigation by instructing his accountants to supply whatever information Harkness requested. (Tr. pp. 286, 287)

According to co-defendant Mildenhall's testimony, Harkness first proposed a bribe to her, telephoned her at her home to discuss the matter, arranged for a private early morning meeting in the IRS office between him and her so that the subject could be discussed again and then specifically requested that Mildenhall set up a meeting between him and Badger. (Tr. pp. 252-282; Exhibits P2, 3, 4 and 5)

II.

The lower federal courts have generally used two tests in determining when the issue of entrapment should be presented to the jury with proper instructions.

First, the issue should be presented if there is any foundation in the evidence tending to show that the accused was entrapped, even where the evidence is weak, improbable, or contradicted by other evidence. *United States v. Timberlake*, 559 F. 2d 1375 (5th Cir. 1977). The courts have also held that evidence which tends to show that a government official first suggested, proposed or otherwise initiated the commission of the crime suffices as a foundation in the evidence tending to show entrapment. *United States v. Gurule*, 522 F. 2d 20 (10th Cir. 1975); *Riley v. United States*, 363 F. 2d 955 (2nd Cir. 1966); *Lufty v. United States*, 198 F. 2d 76 (9th Cir. 1952).

Second, the court may properly refuse a jury instruction only when there is "no evidence" to suggest that the idea of bribing the IRS government official was initiated by the government. *United States v. Kabot*, 295 F. 2d 848 (2nd Cir. 1961), or where the government brings forth "uncontradicted proof that the accused was ready, willing and without persuasion and awaiting any propitious opportunity to commit the offense." *Riley v. United States*, 363 F. 2d 955 (2nd Cir. 1966). See also *Cohen v. United States*, 431 F. 2d 830 (2nd Cir. 1970).

Under the above two tests, the entrapment issue in this case should have been submitted to the jury. There was evidence presented which indicated that it was the IRS employees, not Badger, who first "suggested" or "initiated" the commission of the crime, and the government certainly did not bring forth "uncontradicted" proof that the accused was "ready, willing and without persuasion and awaiting any propitious opportunity" to commit the offense.

Mildenhall explicitly stated in her testimony before the trial court that Harkness first suggested a bribe being offered. She stated that he (Harkness) leaned across her desk and said, "Do

you think George (Badger) would make a deal with me." (Tr. p. 253) Furthermore, it was Harkness who later called Mildenhall to have her set up the first meeting between Badger and Harkness. It is also important to note that Mildenhall, who first contacted Badger concerning the alleged bribe, was herself an IRS agent.

While this version of the bribe overture was contradicted by Harkness' testimony, it was nevertheless presented in court and establishes that at least one version of the incident shows the IRS employees as the initiators of the bribery, not Badger.

It is also highly significant that Badger had been under investigation for one and a half years, had directed his accountant to give the IRS agents all of the information they wanted, and had never attempted to contact Harkness or arrange a meeting with him concerning the investigation. (Tr. pp. 286, 287) This kind of behavior would tend to negate any alleged "uncontroverted" evidence that the defendant was predisposed and awaiting any propitious opportunity to commit the crime.

In a case very similar to the one at bar, the Tenth Circuit recognized entrapment as a valid defense for which "adequate and proper instruction" should be given. In *Marks v. United States*, 260 F. 2d 377 (10th Cir. 1958) defendant was prosecuted for offering and giving a bribe to a special agent of the IRS. The evidence conflicted regarding who, defendant or government agent, first suggested the bribe. The government agent to whom the bribe had been given testified that the bribery idea originated with defendant. Another special agent offered corroborating evidence. Defendant, on the other hand, testified that the government agent first suggested the bribe. The case was submitted to the jury which found the defendant guilty. On appeal, defendant argued that the government had not presented sufficient evidence

to give the case to the jury on the issue of entrapment. The Tenth Circuit held that since evidence was conflicting as to who first suggested a bribe be made, the issue of entrapment was properly submitted to the jury. Implicit in this decision is the principle that once there is evidence tending to show that a government agent first suggested a bribe, the issue of entrapment should be submitted to the jury with proper instruction.

This principle was clearly stated in *United States v. Timberlake, supra. Timberlake* concerned the actions of a narcotics agent who had instructed an informant to contact the accused and arrange a meeting between the agent and the accused. The meeting was arranged which eventually led to the sale of illegal drugs several meetings later.

At trial, evidence was introduced which tended to show that the police had initiated the crime by requesting the informant to contact the defendant; however, the trial judge refused to submit the issue of entrapment to the jury. On appeal, the Fifth Circuit held that once there is some evidence that the government induced the defendant to commit the crime, the question of entrapment becomes a factual one for the jury to decide. *Id* at 1379.

> A trial judge commits reversible error when he fails to instruct the jury on a theory of defense for which there is *any* foundation in the evidence. The record here contained at least minimally sufficient evidence to raise the factual question of inducement. *The jury should have been given the opportunity to believe the appellant's defense, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Id.* at 1379. [Emphasis added]

Failure to submit the issue of entrapment in *Timberlake* was found to be reversible error.

Cohen v. United States, supra, is also illustrative. In this case, defendant was convicted of bribing an IRS official who was conducting an audit of defendant's tax returns. Defendant appealed contending that the trial court's refusal to give his requested entrapment instruction constituted reversible error. The Court of Appeals agreed with defendant and held that an entrapment instruction should have been given. The court explained its holding as follows:

> Evidence of inducement need only show that the government agent initiated the payment, not the amount of pressure the agent applied.
>
> * * *
>
> The production of *any evidence,* negating propensity whether in cross-examination or otherwise requires submission to the jury *however unreasonable the judge would consider a verdict in favor of defendant to be.*[Emphasis added] *Id.* at 832.

In *United States v. Gurule, supra,* defendant was charged with knowingly and intentionally distributing a quantity of heroin. A government agent testified that defendant initiated the sale of heroin by representing to the agent's informant that he was willing to sell. Other government witnesses corroborated this testimony. Defendant, on the other hand, testified that the agent's informant had asked him to help break up a drug ring and that defendant had reluctantly accepted. The case was submitted to the jury which found the defendant guilty. On appeal, defendant argued entrapment as a matter of law. The Tenth Circuit rejected this argument, holding that because of a conflict in the evidence the issue of entrapment was properly submitted to the jury. In so holding, the court stated:

> We hold that the question of entrapment was one of fact for determination by the jury based upon conflicting evidence, involving the issue of credibility; that it was properly submitted to the jury.
>
> Once the defense is raised, the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped, and. . . the jury should be informed that the government must meet this burden. *Id.* at 25.

The evidence presented in the court below indicates that the alleged bribe overture was initiated by Harkness. Such evidence is crucial to the issue of entrapment, and the courts have held that once it has been presented, a judge must submit the issue of entrapment to the jury unless the government can offer uncontradicted proof that the defendant was ready, willing and without persuasion and awaiting any opportunity to commit the offense. *Riley v. United States, supra.*

Because evidence conflicted regarding who initiated the bribe and because the government did not go so far as to provide uncontradicted proof of Badger's predisposition, the issue of entrapment was a factual one and should have been submitted to the jury. Failure of the trial judge to do so was reversible error.

CONCLUSION

For the foregoing reasons and those more fully discussed in Petitioner's May 14, 1980 brief, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 8th day of August, 1980.

STRONG & HANNI
Glenn C. Hanni
Sixth Floor Boston Building
Salt Lake City, Utah 84111
(801) 532-7080

Counsel for Petitioner